United Nations A/71/98

General Assembly

Distr.: General
23 June 2016

Original: English

Seventy-first session
Item 80 of the preliminary list*
Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

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* A/71/50.

16-10659 (E) 120716

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I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 68/114, in which the Assembly requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution 62/68), and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution 61/36) adopted by the International Law Commission.

2. The Commission, in 2001, under the subtitle "Prevention of transboundary damage from hazardous activities" of the topic "International liability for injurious consequences arising out of acts not prohibited by international law", which was first included in its programme of work in 1978, completed and adopted a set of 19 draft articles on prevention and recommended to the General Assembly the drafting of a convention on the basis of the draft articles. In resolution 56/82, the Assembly expressed its appreciation for the valuable work done on the issue of prevention. Pursuant to a request contained in the same resolution, in 2002 the Commission resumed work on the liability aspects, under the subtitle "International liability in case of loss from transboundary harm arising out of hazardous activities". In 2006, the Commission completed and adopted a set of eight draft principles on the allocation of loss and recommended to the Assembly that it endorse the draft principles by a resolution and urge States to take national and international action to implement them.

3. In its resolution 61/36, the General Assembly took note of the principles and commended them to the attention of Governments. In resolution 62/68, the Assembly commended the articles to the attention of Governments, without prejudice to any future action, as recommended by the Commission. It also commended the principles once more to the attention of Governments. Moreover, Governments were invited to submit comments on any future action, in particular on the form of the respective articles and principles, bearing in mind the recommendations made by the Commission in that regard, including in relation to the elaboration of a convention on the basis of the draft articles, as well as on any practice in relation to the application of the articles and principles. Following its consideration, at its sixty-fifth session, of the comments received from Governments,[1] the Assembly invited Governments to submit further comments in its resolution 65/28. In the same resolution, it also requested the Secretary-General to submit a compilation of decisions of international courts, tribunals and other bodies referring to the articles and the principles. At its sixty-eighth session, the Assembly considered the comments received from Governments and the compilation submitted by the Secretariat.[2] It issued another invitation for comments and a request for a compilation in resolution 68/114.

4. In notes verbales dated 13 January 2014 and 24 December 2015, the Secretary-General drew the attention of Governments to resolution 68/114 and invited them to submit, by 31 May 2016, any information (including copies of decisions) regarding instances in which they had pleaded or relied upon the articles or principles before international courts, tribunals or other bodies. A submission was received from

[1] A/65/184 and Add.1.

[2] A/68/170 and A/68/94, respectively.

Australia, which indicated that it had not relied on the articles or the principles, but that it had referred to an earlier version of the articles in its 1995 *Application for permission to intervene under the terms of Article 62 of the Statute* in the *Request for an examination of the situation in accordance with paragraph 63 of the Court's judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) case*.[3]

5. The present compilation, which covers decisions issued between 2013 and June 2016, should be read in the light of the Commission's recommendation that the General Assembly elaborate a convention on the basis of the articles.[4] In contrast, the Commission cast the principles, which it considered to be of a general and residual character, as a non-binding declaration, as it felt that the goal of widespread acceptance of the substantive provisions was more likely to be met if the outcome was in that form. The Commission focused on the formulation of the substance of the draft principles as a coherent set of standards of conduct and practice. Unlike its practice with the articles, it did not attempt to identify the current status of the various aspects of the principles in customary international law. The way in which the draft principles were formulated was not intended to affect that question.[5]

6. The Secretariat has identified four cases in the designated time period in which a relevant body or its individual members addressed issues relating to the articles and the principles: two cases of the International Court of Justice and two cases before tribunals constituted through the Permanent Court of Arbitration.[6] In none of the cases did the relevant court or tribunal refer to the articles or principles directly, although a number of judges of the International Court of Justice did so in their separate opinions. The International Court of Justice strongly relied on its own jurisprudence, while the tribunals constituted through the Permanent Court of Arbitration principally invoked international arbitral and judicial case law to support their findings. Nevertheless, those cases may shed light on the interpretation and application of the articles and principles. They may also inform debates over the continued relevance and future shape of the articles and principles. Section II summarizes, and on occasion reproduces, elements of the decisions that relate to issues addressed in the articles and the principles.

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[3] *Application for permission to intervene under the terms of Article 62 of the Statute submitted by the Government of Australia*, 23 August 1995, para. 35, available from http://www.icj-cij.org/docket/files/97/13317.pdf, in which Australia stated that it would argue "that draft Articles 1 [Scope of the present articles], 2 [Use of terms], 12 [Risk assessment] and 14 [Measures to prevent or minimize the risk] provisionally adopted by the International Law Commission in 1994 in relation to International Liability for Injurious Consequences of Acts Not Prohibited by International Law are also reflective of the customary international law principles from which these specific obligations derive...". See also *Yearbook of the International Law Commission, 1994*, vol. II (Part Two), p. 159.

[4] *Yearbook ... 2001*, vol. II (Part Two), p. 145, para. 94.

[5] See *Yearbook ... 2006*, vol. II (Part Two), pp. 59-61.

[6] As *Aerial Herbicide Spraying (Ecuador v. Colombia)* was settled amicably and removed from the list of the International Court of Justice prior to oral proceedings (see *Order of 13 September 2013, I.C.J. Reports 2013*, p. 278), it has not been included in the compilation. However, it is noteworthy that, in their written submissions, both parties repeatedly referred to the articles and the principles; see Memorial of Ecuador (28 April 2009), vol. 1, paras. 8.1-8.70, 8.80-8.83, 10.40-10.46; Counter-Memorial of Colombia (29 March 2010), vol. 1, paras. 8.9, 8.19-8.30, 8.40 (footnote 863), 8.45-8.112, 8.122; Reply of Ecuador (31 January 2011), vol. 1, paras. 6.1-6.8, 6.29-6.90; Rejoinder of Colombia (1 February 2012), vol. 1, paras. 4.89, 4.91 (documents available from http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=ee&case=138&code=ecol&p3=1).

II. Decisions referring to the articles on prevention of transboundary harm from hazardous activities (annexed to resolution 62/68), and the principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (annexed to resolution 61/36)

International Court of Justice

7. In her separate opinion in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment of 31 March 2014*[7] before the International Court of Justice, Judge ad hoc Hillary Charlesworth insisted that article VIII of the International Convention for the Regulation of Whaling, which imposed conditions on the use of lethal methods in scientific research on whales, should be interpreted in the light of the "precautionary approach". While Judge ad hoc Charlesworth did not refer to the articles or the principles directly, her definition of the "precautionary approach" as "the avoidance of activities that may threaten the environment even in the face of scientific uncertainty about the direct or indirect effects of such activities"[8] closely resembled that of the precautionary principle, which informs article 7 on the assessment of risk,[9] article 10 (c) on risk of significant harm as a factor involved in an equitable balance of interests,[10] and principle 5 (b) on response measures upon the occurrence of an incident.[11] Judge ad hoc Charlesworth cited jurisprudence of the International Court of Justice, including *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*,[12] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*[13] and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*[14] to conclude that "treaties dealing with the environment should be interpreted wherever possible in light of the precautionary approach, regardless of the date of their adoption".[15]

8. In its *Order of 13 December 2013* in the joined proceedings *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures*,[16] the International Court of Justice considered it plausible that Nicaragua could claim a "right to be free from transboundary harm ... derived from the right of a State to sovereignty and territorial integrity" and "a right to receive a transboundary environmental impact assessment". Although the Court invoked its own case law rather than the articles and principles to support its

[7] *I.C.J. Reports 2014*, p. 226 at p. 453.
[8] Ibid., p. 455, para. 6.
[9] *Yearbook ... 2001*, vol. II (Part Two), p. 158.
[10] Ibid., pp. 162-163.
[11] *Yearbook ... 2006*, vol. II (Part Two), p. 84.
[12] *Judgment, I.C.J. Reports 1997*, p. 78, para. 140.
[13] *Judgment, I.C.J. Reports 2010*, p. 71, para. 164 and p. 83, para. 204.
[14] *Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 53.
[15] *I.C.J. Reports 2014*, p. 226 at p. 456, para. 9.
[16] *I.C.J. Reports 2013*, p. 398.

reasoning,[17] its findings are closely aligned with article 3 on prevention and article 8 on notification and information, respectively.[18]

9. In its judgment on the merits in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, 16 December 2013*,[19] the International Court of Justice considered a number of issues closely related to the articles and the principles. For the purposes of the present compilation, the relevant parts of the judgment concerned complaints by Costa Rica about the transboundary effects of the dredging activities of Nicaragua on the Lower San Juan River, and allegations by Nicaragua that the construction of a road along the San Juan River by Costa Rica violated several obligations under international environmental law. In assessing the parties' claims, the Court distinguished between "procedural obligations", including the obligation to carry out an environmental impact assessment and the obligation to notify and consult, and "substantive obligations concerning transboundary harm". While the Court did not refer to the articles and principles explicitly, several judges directly invoked elements of them in their separate opinions.[20]

10. With regard to the "procedural obligation" to carry out an environmental impact assessment, the Court noted that the parties broadly agreed "on the existence in general international law of an obligation to conduct an environmental impact assessment concerning activities carried out within a State's jurisdiction that risk causing significant harm to other States, particularly in areas or regions of shared environmental conditions".[21] A similar obligation is reflected in article 7 on assessment of risk.[22] Invoking its own case law, the Court confirmed that the obligation to exercise due diligence requires States to conduct an environmental impact assessment when there is a risk of significant transboundary harm:

> 104. As the Court has had occasion to emphasize in its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*:
>
> > "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States' (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State." (*I.C.J. Reports 2010 (I)*, pp. 55-56, para. 101.)
>
> Furthermore, the Court concluded in that case that "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may

[17] Ibid., pp. 403-404, para. 19, quoting *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29 and *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 83, para. 204.

[18] See *Yearbook ... 2001*, vol. II (Part Two), pp. 153-155 and p. 159-160.

[19] *Judgment of 16 December 2015*, available from http://www.icj-cij.org/docket/files/152/18848.pdf.

[20] See below, paras. 22-28.

[21] *Judgment of 16 December 2015*, para. 101.

[22] See *Yearbook ... 2001*, vol. II (Part Two), pp. 157-159.

have a significant adverse impact in a transboundary context, in particular, on a shared resource" (*I.C.J. Reports 2010 (I)*, p. 83, para. 204). Although the Court's statement in the *Pulp Mills* case refers to industrial activities, the underlying principle applies generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment.

11. Later in the judgment, the Court reiterated this finding:

> 153. The Court recalls (see paragraph 104 above) that a State's obligation to exercise due diligence in preventing significant transboundary harm requires that State to ascertain whether there is a risk of significant transboundary harm prior to undertaking an activity having the potential adversely to affect the environment of another State. If that is the case, the State concerned must conduct an environmental impact assessment. The obligation in question rests on the State pursuing the activity.

12. The Court then considered how a risk of significant transboundary harm could be determined. It held that "one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm" was "to conduct a preliminary assessment of the risk posed by an activity".[23] Having found no evidence that the relevant party, Costa Rica, had conducted a preliminary assessment of its road project, the Court engaged in its own assessment. It indicated that it would "have regard to the nature and magnitude of the project and the context in which it was to be carried out".[24] The Court subsequently considered the scale of the Costa Rican project, the likelihood of harm (particularly in the light of the location of the project, its physical features and the effects of possible natural disasters) and the geographic conditions of the affected area.[25] The reasoning of the Court could inform the interpretation or application of article 2 (a), which sets out the use of the terms "risk of causing significant transboundary harm".[26]

13. When determining the content of the environmental impact assessment, the Court reiterated its finding in the *Pulp Mills* case, which closely aligns to paragraph 7 of the commentary to article 7 on assessment of risk, that:

> "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment" (*I.C.J. Reports 2010 (I)*, p. 83, para. 205).[27]

14. The Court further emphasized that the obligation to conduct an environmental impact assessment constituted a continuous obligation "and that monitoring of the

[23] Ibid., para. 154.
[24] Ibid., para. 155.
[25] Ibid.
[26] See *Yearbook ... 2001*, vol. II (Part Two), pp. 151-153.
[27] *Judgment of 16 December 2015*, para. 104.

project's effects on the environment shall be undertaken, where necessary, throughout the life of the project".[28] It required an *ex ante* evaluation of the risk of significant transboundary harm, to be conducted prior to the implementation of the project. The Court found that the studies produced by Costa Rica did not fulfil these requirements, as they were post hoc assessments of the environmental impact of the stretches of the road that had already been built, did not evaluate the risk of future harm and were conducted only three years into the road's construction.[29] The Court's finding reflects the wording of article 7 on assessment of risk, which states that "any decision in respect of the authorization of an activity within the scope of the present articles" should be based on assessment of the possible transboundary harm caused by that activity. The Court concluded that Costa Rica remained under an obligation "to prepare an appropriate environmental impact assessment for any further works on the road or in the area adjoining the San Juan River, should they carry a risk of significant transboundary harm".[30]

15. The Court also considered whether, under international law, an emergency could exempt a State, in this case Costa Rica, from its obligation to conduct an environmental impact assessment. After reaffirming that States can themselves determine the specific content of the environmental impact assessment, it pointed out that "this reference to domestic law does not relate to the question of whether an environmental impact assessment should be undertaken. Thus, the fact that there may be an emergency exemption under Costa Rican law does not affect Costa Rica's obligation under international law to carry out an environmental impact assessment".[31] This, again, aligns with the commentary to article 7 on assessment of risk. Eventually, the Court found that there had been no emergency, given the timespan of the project, its location, the absence of an imminent threat of military confrontation and the fact that the case was already before the Court.[32] As a result, the Court declined to decide on the possibility of an emergency exemption.[33]

16. Turning to the "procedural obligation" to notify and consult, the Court noted that "the Parties concur on the existence in general international law of an obligation to notify, and consult with, the potentially affected State in respect of activities which carry a risk of significant transboundary harm".[34] A similar obligation is reflected in article 8 on notification and information. In response to Nicaragua's argument that such obligation was limited by *lex specialis* (*in casu* the 1858 Treaty of Limits as interpreted by the Cleveland Award), the Court observed that "the fact that the 1858 Treaty may contain limited obligations concerning notification or consultation in specific situations does not exclude any other procedural obligations with regard to transboundary harm which may exist in treaty or customary international law".[35]

[28] Ibid., para. 161.
[29] Ibid.
[30] Ibid., para. 173.
[31] Ibid., para. 157.
[32] Ibid., para. 158.
[33] Ibid., para. 159.
[34] Ibid., para. 106.
[35] Ibid., para. 108. The Court also considered the parties' obligation to notify and consult under the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention), United Nations, *Treaty Series*, vol. 996, No. 14583, and the Convention for the Conservation of the Biodiversity and the Protection of Priority Wildlife Areas in Central America, available from http://www.ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-001162.txt; ibid., paras. 109-111.

17. The Court noted, twice, that the obligation to notify and consult flowed from the "obligation to exercise due diligence in preventing significant transboundary harm" and arose when an environmental impact assessment confirmed that there was a risk of significant transboundary harm.[36] That latter aspect is reflected in article 8 (1) on notification and information. Applying that reasoning, the Court found that "since Nicaragua was not under an international obligation to carry out an environmental impact assessment in light of the absence of risk of significant transboundary harm ... it was not required to notify, or consult with, Costa Rica".[37] Similarly, when the Court "established that Costa Rica ha[d] not complied with its obligation under general international law to perform an environmental impact assessment prior to the construction of the road", it held that "the duty to notify and consult d[id] not call for examination by the Court in the present case".[38] Furthermore, the Court found that Costa Rica only had to consult with Nicaragua regarding the further works on the road or in the area adjoining the San Juan River "if the circumstances so require[d]", i.e., if an environmental impact assessment would confirm the risk of significant transboundary harm.[39]

18. With regard to the substantive obligations concerning transboundary harm, the Court again relied on its own case law, even though its finding reflected article 3 on prevention:

> 118. As the Court restated in the *Pulp Mills* case, under customary international law, "[a] State is ... obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (*I.C.J. Reports 2010 (I)*, p. 56, para. 101; see also *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29).

19. In determining whether the parties had caused transboundary harm, the Court considered the effects of dredging;[40] the erosion of sediment from the construction of a road;[41] the alleged harm caused by increased sediment concentrations in the river;[42] the alleged harm to the river's morphology, to navigation and to the dredging by Nicaragua;[43] the alleged harm to water quality and the aquatic ecosystem programme;[44] and other alleged harm, including alleged negative visual impact and the possibility of spills of toxic materials.[45] In all cases, the Court concluded that no significant transboundary harm had been proven.[46] That analysis could inform the application and interpretation of article 2 (c) and principle 2 (e), defining the terms "transboundary harm" and "transboundary damage" respectively.[47]

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[36] Ibid., paras. 104 and 168.
[37] Ibid., para. 108.
[38] Ibid., para. 168.
[39] Ibid., para. 173.
[40] Ibid., para. 119.
[41] Ibid., paras. 181-185.
[42] Ibid., paras. 188-196.
[43] Ibid., paras. 197-207.
[44] Ibid., paras. 208-213.
[45] Ibid., paras. 214-216.
[46] Ibid., paras. 120 and 217.
[47] See *Yearbook ... 2001*, vol. II (Part Two), pp. 152-153 and *Yearbook ... 2006*, vol. II (Part Two), pp. 64, 70.

20. When it came to determining reparation, the Court held that its declaration that Costa Rica had violated its obligation to conduct an environmental impact assessment constituted "the appropriate measure of satisfaction for Nicaragua".[48] In response to the claim by Nicaragua that Costa Rica restore to the extent possible the situation that existed before the road was constructed, and provide compensation for the damage caused insofar as it was not made good by restitution, the Court noted the following:

> 226. ... The Court recalls that restitution and compensation are forms of reparation for material injury. The Court notes that, although Costa Rica did not comply with the obligation to conduct an environmental impact assessment, it has not been established that the construction of the road caused significant harm to Nicaragua or was in breach of other substantive obligations under international law. As such, restoring the original condition of the area where the road is located would not constitute an appropriate remedy for Costa Rica's breach of its obligation to carry out an environmental impact assessment (see *Pulp Mills on the River Uruguay (Argentina v. Uruguay), I.C.J. Reports 2010 (I)*, p. 104, para. 271). For the same reasons, the Court declines to grant Nicaragua's claim for compensation.

21. In his separate opinion, Judge Owada also refrained from a direct reference to the articles or principles, but offered views on the relationship between the requirement to conduct an environmental impact assessment under general international law and the obligation to act with due diligence. Classifying the latter obligation as a "holistic process", Judge Owada asserted that:

> conducting an environmental impact assessment is one important constituent element of the process that emanates from the international obligation of States to act in due diligence to avoid or mitigate significant transboundary harm, rather than a separate and independent obligation standing on its own under general international law. This obligation to act with due diligence in such a way that the initiation of potentially environmentally hazardous activities may be avoided constitutes an established obligation of international environmental law. In this holistic process, an environmental impact assessment plays an important and even crucial role in ensuring that the State in question is acting with due diligence under general international environmental law.[49]

According to Judge Owada:

> the environmental impact assessment, which is essentially of a technical nature, is a means to achieve the ultimate objective of preventing transboundary harm — an obligation relating to the due diligence required. In addition, an environmental impact assessment serves the purpose of enabling the public or civil society to participate in the ultimate decision-making process on activities with potentially significant environmental effects. Significant as the environmental impact assessment may be, as reflecting prevailing practice in recent years, the fact remains that the function of the environmental impact assessment is essentially one of a number of means to

[48] *Judgment of 16 December 2015*, para. 224.

[49] *Separate opinion of Judge Owada*, 16 December 2015, available from http://www.icj-cij.org/docket/files/152/18852.pdf, para. 18.

> be employed when the circumstances of the case so require, in order to attain the ultimate legal objective that is binding upon States acting in the environmental field — an obligation to act with due diligence in order to prevent significant transboundary harm in the light of the assessed risks involved.[50]

Judge Owada maintained that the Court's judgment supported that position. He concluded that "conducting an environmental impact assessment is one important element (though not necessarily constituting an indispensable obligation as such) in the process of fulfilling the obligation of acting with due diligence to prevent significant transboundary harm in each case".[51]

22. Judge Donoghue, in her separate opinion, also considered the status of the requirement to conduct an environmental impact assessment under general international law, as well as the obligation to notify and consult. With regard to the latter obligation, she referred to the articles twice. First, when Judge Donoghue considered the evidence for the alleged customary status of the obligation, she noted that:

> The Court's formulation of specific obligations regarding notification and consultation bears similarity to Articles 8 and 9 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (*ILC Yearbook*, 2001, Vol. II, Part Two, pp. 146-147). Although these widely-cited Draft Articles and associated commentaries reflect a valuable contribution by the Commission, their role in the assessment of State practice and *opinio juris* must not be overstated.[52]

Judge Donoghue again noted the congruence between the Court's judgment and the articles when she found that:

> the Judgment could be read to suggest that there is only one circumstance in which the State of origin must notify potentially affected States — when the State of origin's environmental impact assessment confirms that there is a risk of significant transboundary harm. A similar trigger for notification appears in Article 8 of the International Law Commission's 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[53]

Judge Donoghue further maintained, similar to Judge Owada, that general international law did not recognize independent obligations requiring environmental impact assessments, notification or consultation, but that those requirements flowed from an underlying "obligation under customary international law to exercise due diligence in preventing significant transboundary environmental harm".[54] That left scope for variation in the way a State could conduct an environmental impact assessment.[55] Moreover, it meant that notification and consultation could be required in situations other than those specified by the Court.[56]

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[50] Ibid., para. 21.
[51] Ibid., para. 22.
[52] *Separate opinion of Judge Donoghue*, 16 December 2015, available from http://www.icj-cij.org/docket/files/152/18858.pdf, para. 19.
[53] Ibid., para. 21.
[54] Ibid., para. 1.
[55] Ibid., paras. 12-15.
[56] Ibid., paras. 16-24.

23. In his separate opinion, Judge Bhandari offered suggestions as to how the public international law standards governing environmental impact assessments could be improved. In his discussion of relevant concepts, Judge Bhandari included a reference to article 3 on prevention to support his finding that "the principle of preventive action is another pillar of modern international environmental law";[57] to article 4 on cooperation as evidence of the existence in international law of "the values of good neighbourliness and cooperation";[58] and to the commentary to principle 3 on purposes when he referred to the polluter-pays principle.[59] Furthermore, Judge Bhandari discussed article 2 on use of terms, together with its commentary, to clarify the concept of transboundary harm under international law:

> 21. There exists no single definition of transboundary harm under international law. Though the Draft Principles relating to prevention of transboundary harm by the International Law Commission ("ILC") do contain a definition of this concept, the idea of "risk of causing significant transboundary harm" is quite vague. Harm as per the ILC must be physical and is limited to persons, property or the environment. However, the accompanying commentary does provide some clarity in this regard and explains that the idea of risk and harm are not to be isolated, but thought of in conjunction with each other:
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> > "For the purposes of these articles, 'risk of causing significant transboundary harm' refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of 'risk' and 'harm' which sets the threshold."
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> The ILC also gives guidance on the meaning of the word significant by way of its commentary:
>
> > "The term 'significant' is not without ambiguity and a determination has to be made in each specific case. It involves more factual considerations than legal determination. It is to be understood that *'significant' is something more than 'detectable' but need not be at the level of 'serious' or 'substantial'*. The harm must lead to a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States. Such detrimental effects must be susceptible of being measured by factual and objective standards." [footnotes omitted][60]

Concluding that "there are presently no minimum binding standards under public international that nation States must follow" when conducting an EIA [environmental impact assessment]",[61] Judge Bhandari made several proposals in that regard, largely modelled on relevant provisions of the Convention on Environmental Impact Assessment in a Transboundary Context.[62]

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[57] *Separate opinion of Judge Bhandari*, 16 December 2015, available from http://www.icj-cij.org/docket/files/152/18860.pdf, para. 14.
[58] Ibid., para. 15; see *Yearbook ... 2001*, vol. II (Part Two), pp. 155-156.
[59] Ibid., para. 19; see *Yearbook ... 2006*, vol. II (Part Two), pp. 72-76.
[60] Ibid., 21.
[61] Ibid., para. 29.
[62] Ibid., paras. 31-46.

24. Judge ad hoc Dugard also appended a separate opinion,[63] in which he referred to the articles and the principles multiple times. In the course of offering his views on the relationship between the principle of prevention, the obligation of due diligence and the obligation to conduct an environmental impact assessment, Judge ad hoc Dugard invoked the commentary to article 3 on prevention to argue that the obligation of due diligence flows from the principle of prevention. Moreover, he referred to article 7 on assessment of risk to support his assertion that the obligation to conduct an environmental impact assessment constitutes an independent obligation under international law:

> 7. The obligation of due diligence flows from the principle of prevention. This is emphasized by the International Law Commission's *Commentary* on Article 3 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares "[t]he obligation of the State of origin to take preventive or minimization measures is one of due diligence" (*Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, p. 154, para. 7; see too, p. 155, para. 17). The duty of due diligence therefore is the standard of conduct required to implement the principle of prevention.
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> ...
>
> 9. A State's obligation to conduct an environmental impact assessment is an independent obligation designed to prevent significant transboundary harm that arises when there is a risk of such harm. It is not an obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm. Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm, including in the decision to conduct an environmental impact assessment, the carrying out of the environmental impact assessment and the continued monitoring of the activity in question. The International Law Commission views the obligation to conduct an environmental impact assessment as an independent obligation (Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *YILC*, 2001, Vol. II, Part Two, Art. 7, p. 157), as do the Rio Declaration (Principle 17), the Convention on Biological Diversity (Art. 14) and the Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention") (Art. 2). None of these instruments mentions due diligence in their formulation of the obligation to conduct an EIA.

25. When identifying evidence for the alleged customary international law status of the obligation to conduct an environmental impact assessment, Judge ad hoc Dugard referred to paragraph 4 of the commentary to article 7 on assessment of risk:

> 17. There can be little doubt that there is an obligation under customary international law to conduct an environmental impact assessment when there is a risk of significant transboundary harm. The ITLOS Seabed Disputes Chamber has held that there is a "general obligation under customary international law" to conduct such an assessment. Fourteen years ago, the International Law Commission stated in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities that "the practice of requiring an environmental impact assessment has become very prevalent", citing the laws of several

[63] *Separate opinion of Judge* ad hoc *Dugard*, 16 December 2015, available from http://www.icj-cij.org/docket/files/152/18868.pdf.

developed States in support of such an obligation and declaring that some 70 developing countries had legislation of some kind on this subject (Commentary on Article 7, para. 4, *YILC*, 2001, Vol. II, Part Two, p. 158). These Draft Articles have been commended by the General Assembly of the United Nations (resolution of 6 December 2007, UN doc A/Res/62/68, para. 4). [footnote omitted]

26. Judge ad hoc Dugard again invoked the commentary to article 7 on assessment of risk when he argued that international law imposes certain requirements on the scope and content of an environmental impact assessment:

> 18. In *Pulp Mills* the Court stated that general international law does not "specify the scope and content of an environmental impact assessment" with the result "that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case" (*I.C.J. Reports 2010 (I)*, p. 83, para. 205). This dictum, which is reaffirmed by the Court in the present case (Judgment, paragraph 104), has on occasion been interpreted as meaning that the environmental impact assessment obligation has no independent content and that there is simply a *renvoi* to domestic law. This is incorrect. Obviously there are some matters relating to the carrying out of an environmental impact assessment which must be left to domestic law. These include the identity of the authority responsible for conducting the examination, the format of the assessment, the time frame and the procedures to be employed. But there are certain matters inherent in the nature of an environmental impact assessment that must be considered if it is to qualify as an environmental impact assessment and to satisfy the obligation of due diligence in the preparation of an environmental impact assessment. This is made clear by the International Law Commission in its Commentary on Article 7 of its Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities which declares that an environmental impact assessment should relate the risk involved in an activity "to the possible harm to which the risk could lead", contain "an evaluation of the possible transboundary harmful impact of the activity", and include an assessment of the "effects of the activity not only on persons and property, but also on the environment of other States" (*YILC*, 2001, Vol. II, Part Two, pp. 158-159, paras. 6-8). [footnote omitted]

27. Later in his separate opinion, Judge ad hoc Dugard relied on that argument to argue that an environmental impact assessment cannot be limited to effects on a State's own territory, but must take into account possible transboundary effects:

> 34. ... There is no suggestion that Nicaragua carried out "an objective evaluation of all the relevant circumstances" (Judgment, paragraph 153). On the contrary, the Court itself states that Nicaragua's environmental study was confined to "its own environment" (Judgment, paragraph 105). This flies in the face of the statement of the International Law Commission that an environmental impact assessment should include an assessment of the effects of the activity "on the environment of other States" (see above, para. 18). In these circumstances it is impossible to conclude that Nicaragua had discharged the burden of proof in showing that it had carried out an adequate preliminary assessment of the impact of its dredging programme on Costa Rica's wetlands. ... Nicaragua's environmental impact study which took no account of *transboundary* harm clearly failed to meet the standard of due diligence. ...

Tribunals constituted through the Permanent Court of Arbitration

28. In the *Indus Waters Kishenganga* arbitration between Pakistan and India, the Court of Arbitration constituted in accordance with the Indus Waters Treaty 1960 between the Government of India and the Government of Pakistan, signed on 19 September 1960, considered, inter alia, the right of India under the Indus Waters Treaty 1960 to divert the waters of the Kishenganga/Neelum to operate the Kishenganga Hydroelectric Project. While the Court did not refer directly to the articles or principles, it invoked concepts closely associated with it.

29. In its Partial Award,[64] the Court noted it was incumbent upon it "to interpret and apply this 1960 Treaty in light of customary international principles for the protection of the environment in force today".[65] The Court identified as "a foundational principle of customary international environmental law" the "duty to avoid transboundary harm", for which it found support in the *Trail Smelter* case, principle 21 of the 1972 Stockholm Declaration, and the *Iron Rhine* arbitration.[66] That obligation is also reflected in article 3 on prevention. Citing a series of international conventions, declarations and judicial and arbitral decisions, the Court found that "there is no doubt that States are required under contemporary customary international law to take environmental protection into consideration when planning and developing projects that may cause injury to a bordering State".[67] According to the Court, the International Court of Justice had translated that into an obligation under general international law to conduct an environmental impact assessment when engaging in large-scale construction projects. Failure to assess environmental impact, either at the start or throughout the life of the project, would be contrary to "duties of due diligence, vigilance and prevention".[68] A similar obligation can be found in article 7 on assessment of risk. The Court concluded "that principles of international environmental law must be taken into account even when ... interpreting treaties concluded before the development of that body of law".[69]

30. In its Final Award,[70] the Court reiterated that finding[71] and reaffirmed that "States have 'a duty to prevent, or at least mitigate' significant harm to the environment when pursuing large-scale construction activities".[72] However, since the Indus Waters Treaty 1960 limited the role of customary international law to the "interpretation and application" of the treaty, the Court found that, at least for jurisdictional reasons, customary international law could not displace rights and obligations under the treaty in this case. In particular, the Court did

> not consider it appropriate, and certainly not "necessary," for it to adopt a precautionary approach and assume the role of policymaker in determining the balance between acceptable environmental change and other priorities, or to

[64] *Indus Waters Kishenganga (Pakistan v. India)*, Partial Award, 18 February 2013, *PCA Award Series (2014)*.
[65] Ibid., para. 452.
[66] Ibid., paras. 448 and 451.
[67] Ibid., para. 449.
[68] Ibid., para. 450, referring to *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, pp. 83-84.
[69] Ibid., para. 452.
[70] *Indus Waters Kishenganga (Pakistan v. India)*, Final Award, 20 December 2013, *PCA Award Series (2014)*.
[71] Ibid., para. 111.
[72] Ibid., para. 112, referring to *Partial Award*, supra note 59, para. 451.

> permit environmental considerations to override the balance of other rights and obligations expressly identified in the Treaty ... The Court's authority is more limited and extends only to mitigating significant harm. Beyond that point, prescription by the Court is not only unnecessary, it is prohibited by the Treaty. If customary international law were applied not to circumscribe, but to negate rights expressly granted in the Treaty, this would no longer be "*interpretation or application*" of the Treaty but the substitution of customary law *in place of* the Treaty. [73]

31. In the *Chagos Marine Protected Area* arbitration between Mauritius and the United Kingdom of Great Britain and Northern Ireland,[74] which related to the establishment of a marine protected area around the Chagos Archipelago, the tribunal considered procedural constraints on State action, and noted

> that such procedural rules exist elsewhere in international environmental law, for instance in the general international law requirement to carry out an environmental impact assessment in advance of large scale construction projects (see *Indus Waters Kishenganga Arbitration (Pakistan v. India), Partial Award of 18 February 2013, PCA Award Series*, p. 81 at pp. 291-292, para. 450; *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14 at p. 83, para. 205).[75]

While the tribunal did not refer to the articles and principles directly, that requirement is reflected in article 7 on assessment of risk.

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[73] Ibid., para. 112.

[74] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, 18 March 2015, available from http://www.pcacases.com/pcadocs/MU-UK%20201503l8%20Award.pdf.

[75] Ibid., para. 332.